

IN THE
United States
Circuit Court of Appeals⁴
For the Ninth Circuit.

LOUIE DING et al.,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

**PETITION FOR REHEARING OF
PLAINTIFFS IN ERROR.**

FILED

OCT 16 1917

F. D. MONCKTON,
CLERK.

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*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

No. 2955.

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ARGUMENT.

The principal error relied upon for a reversal of this case was the instruction of the trial Judge in relation to the defense of alibi.

The indictment charged that the conspiracy complained of was entered into by the plaintiff in error, Louie Ding, on the 10th day of December, 1916, in the City of Seattle. The testimony introduced by the Government tended to establish the fact that the conspiracy was formed at the place mentioned, by the plaintiff in error Louie Ding and an alleged co-conspirator, Louis Lortie, about the 10th day of December, 1916, as alleged in the indictment, but not earlier than the 4th day of that month. The time and place of the formation of the conspiracy having been definitely fixed by the evidence of the Government, the plaintiff in error thereupon introduced evidence tending to establish that he was absent from the City of Seattle and the State of Washington from the morning of the 1st day of December, 1916, several days prior to the earliest date fixed by the Gov-

ernment's evidence, until the evening of the 25th day of December following, long after the alleged purpose of the conspiracy had been consummated.

The time and place of the formation of the conspiracy having been definitely fixed by the evidence, and a defense of alibi having been interposed, these questions became material issues in the case.

In the face of the record the trial Judge instructed the jury as follows: "Now it is not necessary that the Government show that this conspiracy was entered into on the 10th day of December; if the testimony shows that the conspiracy was entered into at any time within three years prior to the time of the filing of this indictment by the Grand Jury, which was on the 27th day of March, 1917, it would be sufficient." (Tr., p. 50.)

It is a general rule that instructions must not only state the law correctly, but must be applicable to the issues of the case on trial. In most criminal cases the charge complained of would be correct and appropriate, but where as in this case the element of time becomes a material issue, it is misleading and prejudicial. As soon as the evidence of the Government definitely fixed the time of the formation of the alleged conspiracy, and the defense of alibi was introduced by the plaintiff in error and supported by evidence, the question of the exact time became a material issue; in fact, the most material issue in the case, aside from the general issue of guilt or innocence, and the trial Court should have instructed the jury that if they found that the defendant was not in the City of Seattle when the conspiracy was

alleged to have been formed, they should return a verdict of not guilty.

In the case of *State v. King*, 50 Wash. 312, in dealing with an instruction given in a case where the facts were similar to those in the case at bar, the appellate court clearly points out the correct distinction, as follows: "The defense was that the defendant was not the person who obtained the money, but that he was sick at home, unable to leave his room, between those dates. The time of the commission of the crime was therefore clearly material. There are many cases where no issue is based upon the time when the crime was committed. In such cases this instruction would be correct but was misleading and erroneous in this case, because the time was definitely fixed by the State, and the defense of an alibi was based upon that time. It is difficult to imagine a case where the time of the commission of the crime is not material to a defense of alibi."

To the same effect, see *People v. Morris*, 84 Pac. 463 (Cal.); *State v. Moss*, 73 Wash. 430; *State v. Morden*, 87 Wash. 472.

The reason for the rule thus announced is quite apparent. If the evidence adduced by the prosecution in a criminal case proves or tends to prove that the crime charged was committed upon a certain date, or within a certain period of hours or days, and was committed at a certain place, all that is incumbent upon the defendant, to entitle him to an acquittal, is to establish by evidence that he was not present at the time and place when and where the crime is al-

leged to have been committed, but was elsewhere. Otherwise it would be necessary for him to account for his whereabouts during the entire period of the statute of limitations, usually three years in criminal cases, in order to derive any benefit from the defense of alibi.

The instruction given by the trial Judge in this case not only discredited but entirely destroyed the force and effect of the only defense which the plaintiff in error was able to interpose. Curiously enough this Court, in dealing with the instruction complained of, failed to note the distinction applicable to this class of cases, and consequently fell into the same error as the Court below. In the opinion filed herein we find the following language: "We think these instructions were sufficient to inform the jury on the subject of alibi. The charge being conspiracy, the personal presence of the defendant was not necessary in the making up of the combination, and the Court made it clear enough that the particular conspiracy charged in the indictment and the defendants' participating in it must be established, although the exact date that it was alleged to have been formed need not be proved, provided the evidence showed that it was entered into within three years before the finding of the indictment. Wharton, *Crim. Ev.*, 676; *Jenkins v. State*, 75 S. W. Rep. 312; *Glover v. United States*, 147 Fed. 426; *Hyde v. United States*, 225 U. S. 347."

In the first place, it was never claimed on behalf of the Government that the plaintiff in error Louie Ding entered into the alleged conspiracy through

the medium of an agent or employee, or by the use of the mail or the telegraph service, or by any other indirect method. The only evidence introduced by the Government on this point was to the effect that the plaintiff in error and one Louis Lortie, a Government witness, formed this conspiracy in person on the 10th day of December, 1916, and in the City of Seattle. That was the issue tendered by the Government, and the only issue which the plaintiff in error was required to meet. The time was definitely fixed, the place was definitely fixed, and the persons present were definitely fixed. For this reason the suggestion in the opinion of this Court just above quoted, that the personal presence of the defendant was not necessary to the formation of the conspiracy, is purely gratuitous.

The instruction of the trial Court on this subject is clear. After pointing out that in conspiracy cases the personal presence of the defendant is not essential, it closes with this statement: "In this case the testimony is that the conspiracy was entered into while he (the defendant) was here."

In the second place, as pointed out in the earlier part of this petition, the exact date or dates of the formation of the alleged conspiracy was the most material issue in the case, and it was not sufficient to prove that it was formed or entered into by the plaintiff in error at any time within three years prior to the finding of the indictment. The effect of such a rule in a case like the present, where the time and place of the commission of the alleged crime was

a material issue, is to nullify and destroy the defense of alibi. The very authorities cited in the opinion of the Court show the fallacy of the rule adopted, and completely discredit it.

The citation from Wharton lays down the rule that while in many cases of conspiracy an alibi cannot be shown in defense, yet where a direct issue is raised as to the absence of the defendant at the time of the formation of the conspiracy, alibi is a proper and meritorious defense.

The citation referred to is as follows: "Where the prosecution establishes a conspiracy on the part of two or more persons to do any unlawful act, an alibi cannot be shown in defense, as in a conspiracy the presence or absence of one of the conspirators at the exact time, or the time covered by the findings, is immaterial, and an instruction upon the defense of alibi would be misleading. But where a direct issue is made as to absence at the time of the formation of the conspiracy, alibi is a proper defense."

The authority cited in support of the text by the learned author is the second citation contained in the opinion of this Court, to wit, *Jenkins v. State*, 75 S. W. Rep. 312.

In the present case a direct issue was raised as to the absence of the plaintiff in error Louie Ding, not only at the time of the formation of the conspiracy, but during all of the time of its existence, and until long after it was consummated; and consequently his defense of alibi was a proper one, and should not have been discredited either by the trial Court or by this Court.

The other two cases cited, *Glover v. United States*, and *Hyde v. United States*, have not even the most distant application to the issue involved, and give neither color nor support to the rule adopted by this Court; and we venture the assertion that no case can be found, either in the State or Federal authorities, which even by a strained construction will support the rule laid down by this Court in the case at bar.

In conclusion, we submit that a rehearing should be granted in this case, and the erroneous rule adopted by the Court in this cause be promptly corrected, not only for the benefit and protection of the plaintiff in error, but for the benefit and protection of other defendants in criminal cases who may find themselves without any other defense available than that of alibi.

Respectfully submitted,

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